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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

versus

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., Appellees.

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,

versus

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLANT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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September 2, 1970.

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Appellant Louisville and Nashville Railroad Company (L&N) files this brief in opposition to appellees' Motion to Affirm, which motion, we submit, fails to establish any lack of substantiality in the questions presented in L&N's Jurisdictional Statement.

Appellees do not attempt to deal specifically with the issues raised in L&N's Jurisdictional Statement. Instead, they seek to commingle the appeals in the *C&EI* case (Nos. 386 and 410) with the appeals in the *L&N* case (Nos. 387 and 396), apparently to create the impression that there is but one issue, the notice issue, before the Court in all four appeals.

This is not so. Although appellees' position on the notice issue is without merit in our opinion, such issue is not, and has never been, involved in the appeals related to the L&N train discontinuances. A brief summary of the proceedings before the Commission in the separate *C&EI* and *L&N* cases will place appellees' Motion to Affirm in its proper perspective and establish the baselessness of their position.

Involved in Nos. 386 and 410 are appeals related to the discontinuance, pursuant to Commission order served January 31, 1968, by C&EI of its trains Nos. 54 and 93 which formerly operated between Chicago, Illinois, and Evansville, Indiana. At Evansville, the C&EI trains connected with L&N trains Nos. 3 and 4, which still operate between Evansville and Atlanta, Georgia. At Nashville, Tennessee, about midway between Evansville and Atlanta, those L&N trains formerly connected with the L&N trains involved in the appeal in Nos. 387 and 396, which operated between Cincinnati, Ohio, and New Orleans, Louisiana. The Commission granted to L&N authority to discontinue those trains on September 6, 1968.[1]

[1]Ensuing litigation caused L&N to continue operation of the trains until January 8, 1969.

Discontinuance of the C&EI trains was accomplished some two months before L&N even attempted to discontinue its trains. Two separate proceedings were conducted by the Commission under the provisions of Section 13a(1) with, of course, separate issues presented and different parties appearing at the hearings held in each case. Neither the C&EI nor the L&N was a party to the other's case.

Appellees attempt to establish that the C&EI case and the L&N case are "interrelated proceedings" (Motion to Affirm, p. 5), but the record before the Commission is contrary to that contention. As the Commission found:

> "L&N began incurring substantial losses on these trains in 1967 ($505,361) even with mail revenues of over $1 million, express revenues over $300,000, and additional revenues from passengers interlined at Evansville, Ind., with Chicago & Eastern Illinois Railroad Co. (C&EI) trains Nos. 93 and 54 and connecting with L&N's trains Nos. 6 and 7 at Nashville, via intermediate L&N trains Nos. [3 and 4] . . ." *(Louisville & N. R. Co., Discontinuance of Trains,* 333 ICC 720, 726-727).

Thus L&N was operating Nos. 6 and 7 at a great loss ($500,000 annually) before the C&EI trains were discontinued. That loss, coupled with a declining use of the trains which caused the Commission to find:

> "This is plainly a case where there are too many trains for the diminishing needs of the public on this line." *(Id.,* p. 729),

provided a completely rational basis for Commission authorization for L&N to discontinue the trains.

Moreover, contrary to appellees' assertion (Motion to Affirm, p. 4), the Commission did not suggest that the action pending in the court below concerning the C&EI trains had any influence on its decision in the *L&N* case. In response to the contention made by the opponents that L&N be required to continue to operate the trains until the *C&EI* case was decided in the court below, the Commission found:

> "It is clear that pursuant to the provisions of section 13a(1) of the act, once having entered upon an investigation, we must make the statutory findings needed either to sustain a discontinuance of the investigation, or to support an order requiring continuance of the service within the time limit prescribed by section 13a(1). The evidence before us clearly establishes that the operation of these trains is not required by public convenience and necessity, that the continued operation thereof will unduly burden interstate commerce, and that the investigation should be discontinued; and we so find." (*Id.*, pp. 727-728)

Clearly, therefore, L&N was entitled to have the Commission's decision reviewed on its merits, on this and other issues raised in the court below, before that court summarily remanded the *L&N* case to the Commission.

Appellees have attempted to expand the notice issue (involved only in the *C&EI* case) so as to suggest, at least, that notice should have been posted, not only

at the points served by L&N trains Nos. 3 and 4 operating between Evansville and Atlanta, but, presumably, at the points served by L&N trains Nos. 6 and 7 between Cincinnati and New Orleans.

With respect to the notice issue, it should be emphasized that the appellees herein have never contended, either before the Commission or before the court below, that notice should have been posted at any point between Cincinnati and New Orleans served by Nos. 6 and 7. Obviously, any such contention would have been frivolous, since it would have meant that the C&EI, when it elected to discontinue its trains, would have been required to post notice not only at all points served by the C&EI trains, but presumably at all points served by all trains of other railroads which connected directly or indirectly with the C&EI trains beyond the termini of Chicago and Evansville.

Accordingly, since the notice issue was in no way involved in the case involving the L&N trains, the court below was in error in failing to accord L&N review on the merits of the Commission's order.

Appellees also casually attempt to dispose of the failure of the court below to make the necessary findings of fact and conclusions of law by claiming that in a summary judgment proceeding the court need not make such findings (Motion to Affirm, p. 6, footnote 6). There was no motion for summary judgment pending in the court below in the *L&N* case and, indeed, the court below did not grant the motion of plaintiffs below for summary judgment in the *C&EI* case. Therefore, the order of the court below in the *L&N* case failed

completely to meet the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

Appellees would also have this Court believe that the Commission's order in *Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965), constituted a Commission mandate to L&N to continue to operate passenger trains between Chicago and the Southeast (Motion to Affirm, p. 11). That proceeding involved rival applications for stock control of C&EI, the two contestants being Missouri Pacific Railroad Company and Illinois Central Railroad Company. In that proceeding L&N asked the Commission, as a condition to approval of either application, that it allow L&N to acquire C&EI's line between Evansville and Chicago. The Commission imposed such a condition, basing its decision on the many public-interest benefits which L&N acquisition would bring about. But nothing in that decision can be construed to indicate that improved passenger service was an "important consideration." Moreover, the record in that case was made the early part of 1962, and since then public use of passenger trains has severely declined.

Thereafter L&N reached agreement for acquisition of the line between Evansville and Chicago and filed appropriate application to acquire it. Such application was approved by the Commission on October 23, 1968, *Louisville & N. R. Co.—Purchase—Chicago & E. I. R. Co.*, 334 I.C.C. 273. Had the Commission regarded passenger service between Chicago and Evansville as important, it would likely have conditioned its

order so as to require L&N to reinstitute passenger service on the line. The Commission did not do so.

In addition, the Commission was fully aware of L&N's request to acquire that line when it authorized C&EI to discontinue trains Nos. 54 and 93, but the Commission did not require C&EI to continue operating those trains until L&N acquired the line.

Thus it is apparent that the Commission did not consider passenger service between Evansville and Chicago to have a significant bearing on its decision authorizing L&N to acquire the line. The court below was in error in deciding summarily that the acquisition of the line did have significance.

Respectfully submitted,

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